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Exchange of information

Note by the Interim Coordinator of the Subcommittee on Exchange of Information*

Summary

The present note has been prepared in response to the recommendations made by the Committee of Experts on International Cooperation in Tax Matters at its second session for the amendment of article 26 (Exchange of information) of the United Nations Model Double Taxation Convention between Developed and Developing Countries (ST/ESA/PAD/SER.E/21). The proposed changes expand the scope of information exchanges to include, for example, all national and subnational taxes. Also some exceptions to an exchange of information have been removed, including the exception for domestic bank secrecy laws. The revised text of article 26 is included. Major changes to the commentary are also recommended to reflect changes to the text of article 26 and to address new issues. The proposed commentary on article 26 is provided separately (see E/C.18/2007/10 and 11). Although all comments received from members of the Subcommittee on Exchange of Information are reflected in the report, the report itself has not received final approval of the Subcommittee.

* The views and opinions expressed in the present note are those of the author and do not necessarily represent those of the United Nations.

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* The proposed United Nations commentary on article 26 (proposed 2007) of the United Nations Model Convention is contained in documents E/C.18/2007/10 (commentary on paras. 1-3) and E/C.18/2007/11 (commentary on paras. 4-7) and inventory of exchange mechanisms.

I. Revision of article 26 (Exchange of information)[1]

1. At the second session of the Committee of Experts, on International Cooperation in Tax Matters, the Coordinator of the Subcommittee on the Exchange of Information, José Antonio Bustos Buiza (Spain), presented a position paper prepared by the Subcommittee (E/C.18/2006/6) containing proposed changes to article 26 of the United Nations Model Double Tax Convention between Developed and Developing Countries (ST/ESA/PAD/SER.E/21). Considerable discussion ensued. After discussion, the Subcommittee was asked to prepare a report for the third session of the Committee that made recommendations for amending article 26 and the accompanying United Nations commentary in the light of the discussions at the second session.

2. Section I of the present note proposes revisions to article 26 (Exchange of information). Section II makes recommendations with respect to changes in the United Nations commentary. The expectation is that the Committee will conclude its work on amendments to article 26 at its third session but will not conclude its work on the United Nations commentary. The proposed amendments to article 26 are provided in section III. Sections IV and V, respectively, compare article 26 (proposed 2007) to the current article 26 (2001) and to the 2005 OECD revision of article 26.

3. Owing to the resignation of Bustos Buiza from the Committee, Michael J. McIntyre was appointed on 20 June 2007 as Interim Coordinator to serve in that position until the Committee can consider the appointment of a permanent Coordinator at its third session. The present note has been prepared by the Interim Coordinator and distributed to Subcommittee members but has not yet been acted upon by the full Subcommittee. All comments received from members of the Subcommittee are reflected in the note.

Paragraph 1
Scope of exchange

4. Paragraph 1 of the current article 26 has been broken into three parts. Parts 1 and 2 are found in old paragraph 1 of the Model Double Taxation Convention on Income and on Capital of the Organization for Economic Cooperation and Development (OECD) (OECD Model Convention). OECD broke that paragraph into paragraphs 1 and 2 in its 2005 revision. Part 3 of current paragraph 1 of the United Nations Model Convention was not included in old paragraph 1 of article 26 of the OECD Model Convention and is not included in the 2005 revision. Part 3 is inserted as new paragraph 7 of the proposed draft so as to retain that part and still synchronize paragraphs 1 to 5 in the United Nations and OECD Model Conventions.

[1] The present note has not received the final approval of the Subcommittee. All comments received from members of the Subcommittee are reflected in the note. Members of the Subcommittee are: Michael McIntyre (Observer, Wayne State University), Interim Coordinator; Moftah Al-Moftah (Qatar); Rowena Bethel (Bahamas); Patricia Brown (United States); Paolo Ciocca (Italy); Dmitry Nikolaev (Russian Federation); Robert Waldburger (Switzerland). Comments were received from Paolo Ciocca (Italy) and Dmitry Nikolaev (Russian Federation), who, together with the Coordinator, are referred to in the present note as "the reporting members".

5. Four issues need to be addressed in seeking agreement on a new paragraph 1. The first issue is the proper replacement for the word "necessary" in the first sentence. At the second session of the Committee (see E/2006/45-E/C.18/2006/10, para. 38 (a)), there was a consensus for the words "may be relevant". Alternative language is addressed in the proposed United Nations commentary. OECD also replaced the word "necessary" in its 2005 revision but substituted the words "foreseeably relevant". The OECD language was not accepted by the Subcommittee. The three reporting members all support the use of "may be relevant".

6. The second issue is whether the exchange of information should be restricted, as in the current provision, to matters relating to taxes covered by the convention. The consensus was not to so limit the exchange of information (see E/2006/45-E/C.18/2006/10, para. 37). How the scope of information exchange should be extended is not entirely clear, but the majority view is that the exchange of information should be extended to all taxes, including subnational taxes. The proposed article 26 reflects that position. An alternative view, which is addressed in the proposed United Nations commentary, is that the scope should be extended to the value-added tax (VAT) but not to all taxes. The OECD extended article 26 of its Model Convention to cover all taxes in its 2005 revisions. Two of the reporting members fully support this change. One has reservations, which are reflected in the proposed United Nations commentary.

7. The third issue is whether the words "combating tax avoidance" should be included as an explicit goal of article 26. At the second session of the Committee (see E/2006/45-E/C.18/2006/10, para. 39), there was "extensive support" for including those words in paragraph 1. The current United Nations commentary indicates that combating tax avoidance is a goal of article 26. In addition, the language in part 3 of the current paragraph 1, which would become paragraph 7 in the revised article, charges the competent authorities with the obligation to develop procedures to combat tax avoidance. Mentioning tax avoidance in proposed paragraph 1 simply confirms a position long taken by the Committee. OECD does not mention the goal of combating tax avoidance in its article 26. OECD also has no equivalent to paragraph 7 of the proposed revision to article 26. Two of the reporting members support the inclusion of the words "combating tax avoidance" and the other reporting member is not sure the language is necessary but has no strong objections to its inclusion.

8. The proposed revision of part 1 of paragraph 1 also includes a minor drafting change to break up what had become an excessively long sentence in paragraph 1.

9. The fourth issue with respect to paragraph 1 is whether the scope of information exchange should be constrained by either articles 1 or 2. The consensus was that it should not (see E/2006/45-E/C.18/2006/10, para. 37). OECD has taken the same position. All of the reporting members support this change.

10. One member of the Subcommittee has suggested that the word "and" in the OECD provision should be changed to the word "or" in the proposed revision to better reflect the intent of the Committee. Another member has suggested that the change is not necessary and may create confusion. The proposed draft does not include this suggested change.

Paragraph 2
Confidentiality

11. The only proposed changes in this paragraph from the current article are minor style changes and changes needed to conform to the changes made in paragraph 1. The language in this paragraph differs slightly from the language in the OECD Model Convention. One reporting member suggested that this language change does not improve clarity and that the OECD language might be preferable.

12. OECD included a provision that would allow the sharing of information obtained under article 26 with persons charged with the oversight of the persons allowed to obtain such information. This provision is not included in the proposed article 26, owing to opposition from some members from developing countries who feared that the oversight bodies would not be subject to the same strict rules of confidentiality as tax officials. At its second session (see E/2006/45-E/C.18/2006/10, para. 38 (b)), the Committee was undecided on the matter and indicated that, whatever approach eventually was adopted, the alternative view should also be represented in the United Nations commentary. One reporting member would prefer that the ability to share information with an oversight body be included in the text, whereas the other two prefer that the matter be addressed in the United Nations commentary. The matter is addressed in detail in the proposed United Nations commentary.

Paragraph 3
Limitations on exchange

13. The 2005 OECD revision of article 26 made a change to reflect the break-up of old paragraph 1 into two paragraphs by changing "paragraph 1" to "paragraphs 1 and 2". The same change is proposed for the United Nations revision. It may be unnecessary to make this change because the exchange of information is authorized under paragraph 1, not paragraph 2. The wording in paragraph 2 of article 26 is slightly different in the 2001 United Nations Model Convention from the wording in the OECD Model Convention. That minor difference is retained.

14. A suggestion has been made to add a new subparagraph (d) to paragraph 3 that would clarify that a Contracting State is not required to exchange information in violation of the lawyer-client privilege. At the second session of the Committee (see E/2006/45-E/C.18/2006/10, para. 40), the suggestion was made that the lawyer-client privilege should be addressed in the commentary. The prior report of the Subcommittee, with some objection, had proposed language, taken from the OECD commentary, to be included as subparagraph (d). In the proposed draft, that matter is left for the United Nations commentary on paragraph 5, as suggested by the Committee at its second session. The three reporting members agree that the matter of the lawyer-client privilege should be left for the United Nations commentary.

15. Subparagraph (b) of paragraph 3 already provides that information does not need to be exchanged if obtaining the information would violate domestic laws protecting the client-lawyer privilege. That privilege is a creature of local law. It seems inappropriate to create a special lawyer-client privilege by treaty. Some concern can be raised that new paragraph 5, eliminating bank secrecy as a defence to the exchange of information, might be read broadly to compromise the lawyer-client privilege. That matter is dealt with extensively in the OECD commentary on paragraph 3. In the proposed United Nations commentary, the issue is addressed in

part in the commentary on paragraph 3 and in part in the commentary on paragraph 5. In brief, the proposed United Nations commentary makes clear that there is no blanket override of the lawyer-client privilege but that the privilege cannot be misused to protect information from disclosure merely because it has been disclosed to legal counsel.

16. The OECD commentary has interpreted subparagraph (b) as introducing a reciprocity requirement. As discussed in the proposed United Nations commentary, that requirement is not mandated by the language of that paragraph. Such a requirement would reduce article 26 to a nullity in many treaties between developed and developing countries. Moreover, a reciprocity requirement serves no useful purpose and is inconsistent with the goal of paragraph 1. To avoid any ambiguity, subparagraph (b) might be amended as follows:

> "(b) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or is not obtainable under the laws of that Contracting State or of the other Contracting State;"

Paragraph 4
No domestic interest

17. OECD added paragraph 4 to its Model Convention to make clear that a Contracting State cannot avoid its obligations under paragraph 1 simply because it has no domestic interest in the information requested. The exact language added by OECD is included in paragraph 4 of the proposed article 26. The report of the Committee on its second session does not address new paragraph 4, presumably because the matter was not addressed at that session. A major point of the revision of article 26 of the United Nations Model Convention, however, is to include paragraphs 4 and 5 of the 2005 OECD revision in the United Nations Model Convention. The Subcommittee endorsed both of those paragraphs in its 2006 position paper (E/C.18/2006/6) and the reporting members continue to endorse the inclusion of those paragraphs.

18. In its position paper (see E/C.6/2006/6, para. 20), the subcommittee also suggested the possible addition of the following language to paragraph 4, although it did not actually recommend such an addition:

> "Extraordinary costs incurred in providing information shall be borne by the Contracting Party which requests the information. The competent authorities of the Contracting Parties shall consult with each other in advance if the costs of providing information with respect to a specific request are expected to be extraordinary."

19. The issue of shifting costs to the requesting State is not addressed in the report of the Committee on its second session. The language quoted above is not included in the proposed revision to article 26. The issue is addressed in the proposed commentary. If such language is to be included in the United Nations Model Convention, it should be done in paragraph 7, not in paragraph 4. There are significant advantages in keeping paragraphs 4 and 5 as identical as possible with the corresponding paragraphs in article 26 of the OECD Model Convention. The three reporting members all agree that the matter should be addressed in the commentary.

Paragraph 5
Bank secrecy

20. OECD added paragraph 5 to its Model Convention to make clear that a Contracting State cannot avoid its obligations under paragraph 1 because of its bank secrecy laws. The exact language added by OECD is included in paragraph 5 of the proposed revision of article 26. The report of the Committee on its second session does not address new paragraph 5, presumably because the matter was not addressed at that session. As noted above, a major point of the revision of article 26 is to include paragraphs 4 and 5 of the 2005 OECD revision. The reporting members all support the inclusion of this paragraph.

Paragraph 6
Dual criminality

21. At its second session (see E/2006/45-E/C.18/2006/10, para. 38 (c)), the Committee was undecided on the need for a dual-criminality paragraph in the United Nations Model Convention. The OECD Model Convention does not include such a provision. The report suggested that the United Nations commentary deal with differences of opinion. The implication is that the Subcommittee can include a dual-criminality paragraph in article 26 and explain its significance, or it can omit the paragraph and provide language in the United Nations commentary for those countries that feel the need for a dual-criminality paragraph. It is understood that the paragraph is of particular importance to countries that limit the exchange of information to criminal matters — a position inconsistent with paragraph 1. The Subcommittee recommended inclusion of the paragraph in its position paper (E/C.18/2006/6).

22. Consistent with the position previously taken by the Subcommittee, the dual-criminality paragraph is retained, modified slightly to avoid any inference that criminal activity is required for the exchange of information. The three reporting members concur with that decision. In accordance with the suggestion made in the report of the Committee on its second session, the matter is addressed in the proposed United Nations commentary.

Paragraph 7
Implementation through competent authorities

23. As noted above, the first sentence of paragraph 7 of the proposed article 26 comes directly from the last sentence of paragraph 1 of article 26 of the current United Nations Model Convention, modified only for style requirements. The United Nations commentary indicates that one of the purposes of this provision is to authorize the automatic and spontaneous exchange of information, as well as exchanges by specific request. Given the importance of automatic and spontaneous exchanges to effective tax administration, paragraph 7 has been modified to make that point more explicit. The following language is taken from the United Kingdom/India treaty (also found in several other treaties). The amendment to the current language is in italics:

> "7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax

avoidance. *The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.*"

24. One of the reporting members strongly favours the inclusion of language specifically authorizing automatic exchanges of information in the text of the United Nations Model Convention. The other two reporting members are not sure the language is needed but do not have strong objections to its inclusion. The matter is addressed in the proposed United Nations commentary.

II. Revision of the commentary on article 26 (Exchange of information)

25. The major changes proposed in the text of article 26 require significant changes in the United Nations commentary on that article. Changes in the United Nations commentary also are required to respond to the significant changes made in 2005 to the OECD commentary on its version of article 26, at least in part because the current United Nations commentary includes extensive quotations from the old OECD commentary. Finally, some changes in the commentary are needed to reflect new concerns.

26. The proposed United Nations commentary has been reorganized in three important respects. First, the inventory of information exchange mechanisms has been placed in its own section (sect. C) and moved to the end of the United Nations commentary on article 26. Only numbering changes and minor style and conforming changes have been made in that section. Second, all issues relating to the general application of article 26 have been moved to an introductory section (sect. A). Finally, the material relating to specific paragraphs of article 26 (sect. B) has been reorganized to track more closely the text of proposed article 26. No attempt was made to preserve the original numbering or to relate the numbers to the corresponding numbers in the OECD commentary.

27. At its second session, the Committee took the position that article 26 should be drafted so as to provide for the widest possible exchange of information. That basic position is reflected in the proposed changes to the United Nations commentary. Countries wishing to take a less expansive view on information exchange are free to depart from the United Nations Model Convention. Some guidance is provided in the proposed commentary for limiting the scope of information exchange in areas that are likely to be controversial.

28. Responding to concerns expressed at the second session of the Committee, the proposed commentary adds some additional examples. The existing examples tend to illustrate only the most obvious applications of the Model Convention. The same may be said of most examples found in the OECD commentary on article 26. Those examples are retained but a few additional examples are provided to give guidance on more controversial matters.

29. The prior practice of simply inserting lengthy passages from the OECD commentary is abandoned in the proposed revision. The proposed United Nations commentary continues to rely heavily on the OECD commentary, in that many of

the paragraphs in the proposed United Nations commentary are taken almost verbatim from the OECD commentary. In every case, however, the borrowed material has been adapted to serve its proper function in the United Nations commentary. The goal is to provide a stand-alone document that can be understood and interpreted without specific reference to the OECD commentary. In appropriate places, nevertheless, the reliance on the OECD commentary is noted. In addition, the proposed United Nations commentary notes where the text of article 26 is identical to the text in the OECD Model Convention and indicates that the OECD commentary is fully applicable in interpreting that text.

30. OECD has responded to the difficulty of amending existing treaties by attempting to change traditional interpretations of those treaties through amendment of its commentary. For example, OECD suggests that the addition of paragraph 5, which, inter alia, overturns bank secrecy regimes for purposes of article 26, is primarily an interpretative change rather than a substantive change. That approach has merit in cases where the member States agree to be bound by the OECD commentary as it may be amended. The United Nations commentary does not enjoy that same legal status, so that amendment of the text by amendment of the United Nations commentary is not a viable strategy in many cases. The proposed United Nations commentary notes without comment the various attempts of the OECD commentary to change traditional interpretations of article 26.

31. The OECD commentary has interpreted paragraph 3 of article 26 as creating a reciprocity requirement — that exchange of information is not required unless both tax administrations have approximately equal capacity. As noted in the proposed United Nations commentary, that requirement would often reduce article 26 to a nullity in the case of a convention between a developed country and a developing country. The OECD commentary is fully aware of the problem, and it suggests that amendment of the text of paragraph 3 may be appropriate. It also seeks to reduce the scope of the problem by making certain aggressive assumptions about the equality of capacity. The proposed United Nations commentary takes the position that paragraph 3 does not create a reciprocity requirement. It also offers alternative language for the text of paragraph 3. This issue is of paramount importance to developing countries and ought to be addressed explicitly by the Committee at its third session.

32. The OECD commentary deals extensively with the issue of lawyer-client privilege. Unfortunately, it has put the emphasis on the relationship of that privilege to paragraph 3, whereas the real problem is the effect on that privilege of the addition of paragraph 5 (removing secrecy with respect to agents and fiduciaries as a basis for objecting to an exchange of information under paragraph 3). The proposed United Nations commentary maintains, with some revisions, the substantive positions taken on this issue in the OECD commentary. However, the proposed commentary places the discussion of the privilege issues partly in the discussion of paragraph 3 (discussing when the privilege applies) and partly in the discussion of paragraph 5 (discussing when the exception to paragraph 3 may be applicable). In addition, the suggested amendment to paragraph 3 provided in the OECD commentary is redrafted and provided as a possible amendment to paragraph 5. The problem with the approach taken in the OECD commentary is that it seems to create a special treaty privilege, whereas the proper result is simply to preserve, in appropriate cases, a privilege that may be available under domestic law.

33. An important function of the United Nations commentary is to provide guidance to courts and other juridical bodies in the interpretation of the text of the treaty. To provide such guidance, the proposed United Nations commentary typically states the purpose of each of the paragraphs in article 26. In some cases, the purpose of subparagraphs is stated. The goal is to encourage juridical bodies to adopt a more purposeful interpretation of treaties. The Vienna Convention on the Law of Treaties requires, as a matter of international law, a purposeful interpretation of treaties. Unfortunately, courts in many countries have addressed tax treaties as if they were exempt from this requirement. The proposed United Nations commentary is unlikely to change well entrenched patterns of interpretation, but at least if offers guidance to juridical bodies that seek to employ a purposeful approach.

34. The Subcommittee did not undertake a substantive review of what constitutes section C of the proposed United Nations commentary because such a review is not required to bring the United Nations commentary up to date. Section C provides an inventory of mechanisms for exchanging information and offers guidance, or raises questions, on a variety of practical issues. An issue to be discussed is whether that section actually belongs in the United Nations commentary. If it is retained, the Committee may want to consider a substantive review of that section at some future date.

III. United Nations Model Convention (proposed 2007)

35. The text of article 26 (proposed 2007) of the United Nations Model Convention reads:

Article 2[2]
Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, in so far as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing fraud or evasion of such taxes or in combating tax avoidance. The exchange of information is not restricted by articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in

[2] Coordinator's draft of 16 August 2007. Paragraph 1 of the current article 26 has been broken into three parts. Part 1, as amended, remains as paragraph 1. Part 2 of paragraph 1, as amended, is renumbered as paragraph 2, following the change made in the corresponding OECD article. Part 3, which is not included in the OECD article, is renumbered as paragraph 7 and moved, as amended, to the end of article 26. Current paragraph 2 is renumbered as paragraph 3, following the change made in the corresponding OECD article.

relation to, the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this Article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax avoidance. The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.

IV. Comparison of article 26 (proposed 2007) with current article 26 (2001)

36. The following is a comparison of article 26 (proposed 2007) with current article 26 (2001):

Article 26
Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as ~~is necessary~~may be relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes ~~covered by the Convention~~of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, in so far as the taxation thereunder is not contrary to the Convention~~, i.~~ In particular ~~for the prevention of~~, information shall be exchanged that would be helpful to a Contracting State in preventing fraud or evasion of such taxes or in combating tax avoidance. The exchange of information is not restricted by articles 1 and 2.

~~[~~2.~~]~~ Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes ~~which are the subject of the Convention~~referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes ~~but~~. They may disclose the information in public court proceedings or in judicial decisions.

~~[~~3.~~]~~ In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

~~[~~4.~~]~~4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this Article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not

constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which ~~such~~ exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax avoidance.

The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.

V. Comparison of article 26 (proposed 2007) with OECD version (2005)

37. The following is a comparison of article 26 (proposed 2007) with the OECD version (2005):

Article 26
Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as ~~is foreseeably~~may be relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, ~~insofar~~in so far as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing fraud or evasion of such taxes or in combating tax avoidance. The exchange of information is not restricted by articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State ~~and~~. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1~~, or the oversight of the above~~. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) ~~to~~ To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) ~~to~~ To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) ~~to~~ To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. The obligation to exchange information arises under paragraph 1 whether or not a person under investigation is suspected of criminal activity. In no case shall the provisions of this Article be construed to permit a Contracting State to decline to supply information solely because the conduct being investigated would not constitute a crime under the laws of that Contracting State if such conduct occurred in that Contracting State.

7. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made, including, where appropriate, exchanges of information regarding tax avoidance. The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases, or otherwise. The competent authorities of the Contracting States shall agree from time to time on the list of information or documents which shall be furnished on a routine basis.